No. 12070

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MYRON E. GLENN, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD.,

Defendant-Appellee.

No. 12071

RAYMOND F. DRAKE, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD.,

Defendant-Appellee.

APPELLANTS' REPLY BRIEF.

DAVID SOKOL,
709 H. W. Hellman Building, Los Angeles 13,

PACHT, WARNE, ROSS & BERNHARD, and
ISAAC PACHT,
BERNARD REICH,
HENRY ATTIAS,
9700 Wilshire Boulevard, Beverly Hills,

Attorneys for Plaintiffs-Appellants.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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APPELLANTS' REPLY BRIEF.

This brief is presented for the purpose of summarizing the contentions of the parties and clarifying their respective positions. Appellee's arguments, the cases cited, and the attempts to distinguish the cases and points relied upon by Appellants, do not raise any further issues nor present any contentions which have not been fully answered in Appellants' brief.[1]

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[1]Appellants' brief shall be referred to by the letter "B." The brief of Appellee shall be referred to as "A. B." The Appendix to Appellee's brief shall be referred to as "Ap."

In substance, as Appellants' brief clearly states, the claims of Appellants are for overtime compensation for work performed and made compensable by a contract or custom to pay for such work, which claims were improperly disposed of by the lower Court in dismissing the actions without a full trial on the merits.

As we read the brief of Appellee, the contentions put forth in support of its position and in opposition to that of Appellants, may be stated to rest on the following propositions:

A. The Court acted properly in dismissing the action for lack of jurisdiction of the subject matter where it affirmatively appeared without contradiction that there was no conflict on any material issue.

B. The Portal-to-Portal Act bars the claims of Appellants.

C. There was no contract between the Appellants to pay for the work performed by Appellants for which recovery is sought because the specific activities for which compensation is sought are not set forth in the alleged contracts between the parties.

D. The affirmative defenses of good faith were established as a matter of law.

DISCUSSION OF THE CONTENTIONS OF APPELLEE.

I. Dimissal of the Action.

In summary, the contention made by the Appellee that dismissal was proper rests on the argument that dismissal for lack of jurisdiction is proper where it affirmatively appears that there is no conflict in any material issue of fact. With the abstract statement of the rule of law governing dismissal, we have no quarrel. However, the rule justifying dismissal where it affirmatively appears that the court is without jurisdiction, cannot be removed from the context in which the rule is meant to apply and be used indiscriminately as a justification for dismissal in cases like the ones at bar, where the evidence is in conflict and where the facts are put at issue by denials, affidavits, and depositions. The employment relationship existing between employer and employees is a composite of many facts, including the understanding of the parties, their conduct, the duties performed, and any number of factors, the true meaning of which may be ascertained only by a close inspection of all the facts by the Court.

Appellants have set forth the appropriate rules of law, governing situations where the facts are in dispute (B. 15-25). The attention of the Court is respectfully directed to the discussions therein set forth, where it clearly appears that the question of jurisdiction cannot be summarily disposed of on the basis of affidavits and conflicting evidence.

Appellee attempts to avoid the application of the appropriate rules of law by argumentatively proceeding on the assumption that the record is devoid of any dispute, and that its position is one which is acquiesced in by Ap-

pellants without contradiction. A mere examination of the mass of data presented by affidavit, deposition, and oral hearing, conclusively points to the insubstantial basis of Appellee's claim in this respect. Without wishing to be repetitious, we respectfully call the attention of the court to Appellants' brief, pages 13 and 14, where the facts in dispute are summarized with supporting record references. As an examination of these facts in dispute show, the very material issues constituting the nature of the employment relationship between Appellants and Appellee were at all times in conflict and at no time possessed of the simple clarity for which Appellee argues.[1]

The very argumentative nature of the position of Appellee gives evidence of the existence of the disputes with respect to the facts.

As an example of the dispute existing on the facts, we wish to point out to the Court certain statements made by Appellee in its brief commenting on the facts and attempting to argue, insufficiently and improperly it seems at this stage of the proceedings, the merit of its factual position.

Appellee states as follows:

> "Notwithstanding the claims of the resident employee appellants that they had a definite eight hour shift, *we believe we could have convinced any reasonable court or jury that the time in which it took them to perform their active duties between their first and last calls to the switching centers was much less than eight hours per day.* Indeed, an examination of the summary of the logs of the sub-station men which were introduced at the pre-trial hearing on November 18, 1946 [Deft. Exs. B-1 to S-6] show

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[1]See Appendix pp. 1 to 10 for statement of disputed facts.

that on the basis of time estimated by Mr. Lyons in his testimony [D. R. 117, 127], which is uncontroverted, the time required for their active duties about the sub-station would average between 1½ and 2 hours per day (App. pp. 115 to 120). It is true that in addition to that they were required to take care of their yards and station grounds, but it may be doubted whether that time should be computed under the Act. Even if it should, it only consumed a short time each day.

While in the depositions the appellants complain of the strain of answering call-outs, the exhibits U to CJ, introduced at the said pre-trial hearing show all recorded call-outs of the resident employee appellants and that as to each such appellant there were a number of months in which there were no call-outs at all, and that the call-outs of all resident appellants averaged one in 15.5538 days." (A. B. 20, emphasis added.)

In discussing the employment contract between the parties, Appellee gives evidence of a dispute in arguing the contentions of Appellants:

"Appellants argue that the bulletin constituted a direct promise to pay overtime for all time spent upon defendant's premises in excess of forty hours per week. It is clear that no such interpretation can be reasonably drawn from the language of the bulletin." (A. B. 30.)

In concluding that the contentions of Appellants are absurd, a position which certainly evidences a dispute between the parties as to the nature of their employment relationship, Appellee states:

"There is another legal principle which, independent of other considerations, would prevent such con-

> struction. It is well settled that when there are two possible constructions of a written instrument, one of which will lead to fair and equitable results and the other to absurd and inequitable results, the former will be accepted." (A. B. 32.)

Appellee further attempts to argue the facts by drawing conclusions from the conduct of the parties. It is of course elementary that conduct is a question of fact to be determined by a full trial of the issues.

> *Skidmore v. Swift & Co.*, 323 U. S. 134, 89 L. Ed. 124 (1944).

Appellee states:

> "It is, of course, elementary that in interpreting a contract, the conduct of the parties may be considered. In this case, however, there is no need of relying on that rule, since the appellants claim that the contract itself was not wholly written but consisted of the bulletin, the employment, and *custom and practice.* When the conduct of the parties is considered, it is crystal clear that neither party interpreted the bulletin as containing any promise or agreement to pay overtime other than for emergency services performed during the nighttime hours." (A. B. 33.)

Appellee further manifests the existence of a controversy concerning the employment relationship existing between the parties by argumentatively discussing Appellants' construction of the employment agreement:

> "Appellants' argument that they understood the bulletin A-36 as promising pay for their standby time is absurd, in view of their conduct as disclosed by this record.
>
> As we have pointed out, at the time of the issuance of those bulletins it was not usually supposed

that standby time was compensable, and it is clear that it was not being paid for by the defendant either before or after the revision of the bulletin of 1942 or 1943. Could any intelligent person have understood the bulletion as promising him compensation for standby time when at the time of his employment he was told that the job required him for five days a week to live on the Company's premises, and during those days to remain twenty-four hours a day close enough to the station house or his residence to be able to respond in case his services were needed for an emergency; that he would be paid overtime for any emergency work performed during the nighttime hours, and then, by bulletin, informed that he had no regular hours in which to perform his services but that forty hours should be considered a week's work, and he would be paid time and a half for any excess hours; that he was then instructed to show for his normal services eight hours, neither more nor less, regardless of whether he performed that amount of service, and to show as overtime only emergency services performed during the nighttime hours, and that his overtime compensation would be determined by computing his hourly rate on the basis that his monthly salary was paid for forty hours of service?" (A. B. 38-39.)

Without laboring the point, and without burdening this Court by the request that it fully examine the record in order to determine the confused state of the facts upon which the Court below improperly acted in summarily dismissing the claims of Appellants, it seems from the above discussion that there is no basis upon which the summary disposition by the Court below can be upheld by this Court (see B. 15-25).

The record is replete with instances of the contradiction existing on the facts constituting the employment relationship of the parties to the extent that it is impossible for one fully to understand that relationship without a minute and close examination of all the data. Certainly on the basis of the record it cannot be contended that it is clear and that it affirmatively appears that Appellants are entitled to no relief. The court should exercise its summary power with caution and not deprive litigants of their right to be heard on the merits. It is hard to imagine a situation where this truth is more appropriately applied than in these cases.

II. The Portal-to-Portal Act.

Appellee argues that no distinction may be made in the application of the Portal-to-Portal Act to portal-to-portal claims as such, and to the claims of Appellants here for work performed. It states that no case has made such a distinction notwithstanding the cases cited and discussed by Appellants at pages 28, 29, and 30 of their brief.

The Appellee seeks to distinguish the *Conwell* case by pointing to the distinction between the facts of that case and the facts with which we are here concerned. However, this distinction cannot be supported as an examination of the *Conwell* case will show. In *Conwell v. Central Missouri Telephone Co.*, 76 Fed. Supp. 398 (U. S. D. C. Mo., 1948), the Court sets forth the facts of employment of plaintiff as follows (76 Fed. Supp. 400):

> "There is little dispute about the facts. Mrs. Conwell was employed as night telephone operator at Holden, Missouri, for approximately 20 years, and Miss Pinkepank was employed in the same capacity at Sweet Springs, Missouri, for a little longer period of

time. During all of that period of time plaintiffs were on what is termed an eleven-hour tour. They were required to go on duty at nine o'clock in the evening and to remain there until eight o'clock the following morning. They were paid for eight hours only until 1943. The difference between the time compensated for and eleven hours was designated as sleeping time, and a cot was furnished by defendant and placed in a room near the switchboard so that the operator might utilize such time as her duties permitted in rest or sleep. In 1943 an increase in pay was requested and additional compensation was allowed by reducing the sleeping time at Holden from three to two hours and at Sweet Springs from three to two and one-half hours. Thereafter, Mrs. Conwell was paid for nine hours and Miss Pinkepank for eight and one-half. The switchboards were located in buildings owned or leased and controlled by defendant and were not in the homes of the operators. There was no change in plaintiffs' duties after the passage of the Fair Labor Standards Act of 1938. There was no written contract of employment. At the beginning of the period for which overtime compensation is sought, plaintiff Pinkepank was receiving 32 cents per hour and plaintiff Conwell 33 cents per hour. Periodic increases ultimately raised the hourly wage to 40 cents. In 1943 when plaintiffs requested an additional wage increase, defendant simply shortened the sleeping time and increased the working time.

Defendant has about 25 exchanges in central Missouri. Sweet Springs has a population of about 1,800 and between 600 and 700 telephone patrons. Holden is slightly smaller in population and number of patrons. Plaintiffs are still employed by defendant.

The switchboards operated by plaintiffs are commonly known as drop boards. Whenever a call comes into the board a small metallic disk-like device attached to the switchboard drops and exposes an aperture into which a plug is inserted to form the connection. Many of the patrons of each of the offices are rural subscribers, and a number of such subscribers are on each line. It is not necessary for a patron on a rural line calling another patron on the same line to route the call through the exchange. Each patron on such a line has a designated 'ring' and answers when he recognizes his designated 'ring' or signal. But notwithstanding the fact that such calls are not routed through the exchange, when a call is placed by one subscriber to another subscriber on the same line, the drop to which the line is attached on the board falls, and it requires the manual effort of the operator to replace it. Also during electrical storms the drops on a board will often fall, and the operator must replace them before the lines are again available for use in making connections. Consequently during the entire period that plaintiffs worked for defendant, they were required to replace the drops after they fell at whatever time that might be during their hours of duty.

Several long distance lines were routed through each of the switchboards each night. These lines afforded long distance service to patrons of smaller communities where the switchboards were closed at early hours each night. These long distance lines were in addition to the regular lines serving Sweet Springs and Holden.

The operators were charged with the responsibility of making records of long distance calls. Occasionally they dusted the boards, and during the winter months they maintained the fire in the stove in their exchange.

However, their duties outside those of attending the switchboards, it seems to me, are of no consequence in determining whether they come within the provisions of the Fair Labor Standards Act.

The number of calls through each of the exchanges varied with the talking desires of the patrons. The load usually had decreased considerably by eleven o'clock or midnight. Thereafter, calls were infrequent. Often there were considerable periods of time when there were no calls, and other periods when calls were more numerous, requiring more constant attention to the board. Usually after the ordinary load began to decrease, an automatic, electric bell was turned on, and the operator was permitted to leave the board. If a call came through the board, the bell sounded, attracting the attention of the operator.

The operator was not permitted to leave the premises or the room in which the switchboard was located between the time she went on duty at nine o'clock in the evening and the time her tour of duty ended at eight o'clock the following morning. Whatever the requirements of the board were with respect to the number of calls to be serviced by her, she was required to be there. Although the evidence is silent as to the exact number of calls that went through after midnight, it does reveal that the number of such calls varied nightly. Some nights the operators were able to get several hours of uninterrupted sleep; at other times they were disturbed at frequent intervals and obtained very little sleep. Whatever time was used in actual attendance upon the switchboard in excess of eight hours per day prior to 1943, and in excess of eight and one-half hours for Pinkepank and nine hours for Conwell thereafter, was not compensated for by the defendant." (Emphasis added.)

There is no distinction in substance in the employment relations involved in the *Conwell* case and the employment relations involved here. The Appellants, other than the primary service men, were required to remain on the premises to be available to perform whatever duties might arise, which is exactly the fact in the *Conwell* case.

With reference to the application of the Portal-to-Portal Act to cases of this kind, it is well to set forth the position of the lower Court in the *Conwell* case on the hearing on defendant's Motion to Dismiss. In *Conwell v. Central Missouri Telephone Co.*, 74 Fed. Supp. 542 (U. S. D. C. Mo., 1947), the Court stated (74 Fed. Supp. 545):

> *"It is difficult to conclude that the Congress of the United States intended to deny jurisdiction of the Court over legitimate claims of employees who had actually worked many hours in excess of 40 hours permitted by the Fair Labor Standards Act.* Nowhere was it insisted during the consideration of the Act that such claims were unfair or unjust or outside the scope of the Fair Labor Standards Act, *nor were there any expressions indicating a desire to destroy any such claims, or the jurisdiction of the Court with respect thereto except in so far as it was necessary to deny jurisdiction with respect to the portal-to-portal pay cases which were not seeking compensation for actual services rendered for productive labor, but for traveling and waiting time and for other activities outside actual productive activities."* (Emphasis added.)

The attention of the Court is respectfully directed to the discussion of the case of *Mauro v. Malcolm M. Slaughter & Co.* (U. S. D. C. N. Y., 1948), 14 Labor Cases, par. 64,299, p. 72,715 (B. 29-30).

In the case of *Hess v. du Pont de Nemours & Co.* (U. S. D. C., N. J., 1949), 16 Labor Cases, par. 65,084, p. 75,438, the complaint alleged in paragraph 7(a) that certain plaintiffs were actually employed for 8½ hours, one-half hour of which was designated as a meal period, and that the defendant curtailed the 30-minute meal period by directing the plaintiffs back to work at the end of 20 minutes. There was alleged Rule No. 1 of the Defendant's Rules & Regulations, as follows (16 Lab. Cases, par. 65,084 at p. 75,438):

> "In the event an employee works over 8 hours per day or over 40 hours per week, he will be paid in excess of 8 hours per day or over 40 hours per week."

It was further alleged in paragraph 7(b) of the complaint that the plaintiffs reported for certain work in advance of their shifts. Defendant moved to dismiss on the ground that the plaintiffs had failed to allege a contract to pay compensation for the particular time for which overtime compensation was sought. The court in refusing to dismiss paragraph 7(a) of the complaint stated (16 Lab. Cases, par. 65,084 at p. 75,439):

> "The situation herein is ruled by *Central Missouri Telephone Company v. Conwell,* 170 F. (2d) 641 . . . According to paragraphs 7(a) and (c) of the complaint at least, it is made to appear that the excess of work was achieved by encroaching upon the plaintiffs' uncompensated meal periods."

The Court, however, adopted a different position with respect to the pre-shift time for which compensation was sought in paragraph 7(b). Since there was no contract, custom or practice alleged, paragraph 7(b) of the complaint which involved portal activity was ordered dismissed. This case points up the distinction to be made in the treat-

ment of claims for non-portal activities and claims for portal-to-portal activities. The Court applied the rule of *Central Missouri Telephone Company v. Conwell* with respect to the claims for work as distinguished from the claims for portal-to-portal activity. This is a proper construction because it effectuates the intent of both the Fair Labor Standards Act and of the Portal-to-Portal Act. If the Court were to apply the Portal-to-Portal Act indiscriminately to all claims for work, then it would be a simple matter for an employer to escape his obligation under the Fair Labor Standards Act by engaging an employee to work with the reservation of no agreement to pay for such work. Such an interpretation of the two acts would render the Fair Labor Standards Act nugatory.

While it is true that there is conflict in the interpretation of the Portal-to-Portal Act, it seems necessary, in order to give effect to the requirements of the Fair Labor Standards Act, that the Portal-to-Portal Act be restricted to the application of those non-meritorious claims for portal-to-portal actvities which were created by *Anderson v. Mt. Clemens Pottery Co.,* 328 U. S. 680, 90 L. Ed. 1515 (1946), and not indiscriminately and blindly applied to eliminate compensation to employees for work honestly given.

III. The Existence of a Contract to Pay for the Activities Performed by Appellants.

Appellee takes the position that Bulletin A-36 did not constitute a contract to pay for the activities performed by Appellants on the ground that it does not specify with particularity the activities that are to be compensated. In support of this position, Appellee points out that the recovery by Appellants would constitute a windfall and, further, that their claims are absurd.

Appellee seeks to rely upon the conduct of the parties as an aid to the construction of the employment agreement and seemingly takes the position that because they had not been paid for their services there was no contract to pay. This is a novel and ingenious rule of contract construction and its logical extension would bar all suits on contract on the theory that if there is no performance there is no contract.

Appellee dismisses the applicability of the case of *Joshua Hendy Corp. v. Mills,* 169 F. 2d 898 (C. C. A. 9, 1948), cited and discussed in Appellants' brief at pages 31, 32, and 33 as follows:

> "Appellants assert (B. 31-3) that this Court had before it in Joshua Hendy Corp. v. Mills, 169 F. 2d 898, a contract substantially similar to that alleged here as being set out in Bulletin A-36. This is entirely erroneous. An examination of that case will show that waiting or standby time was not involved; that the contract in that case was a definite written one between the union and the appellants, and was in no wise similar to the bulletin." (A. B. 29-30.)

It will be noted that Appellee's attempted distinction rests on the assertion that waiting time was not involved in the *Joshua Hendy* case. This, however, is of no moment. The only issue is whether there is a contract to pay for work performed, and whether the work was performed. It is completely irrelevant to any consideration of the matter whether the work consisted in waiting or in the performance of other activities.

Appellee's further distinction rests on the assertion that in the *Joshua Hendy* case the contract was negotiated between the Union and the employer. It is difficult for us to

see why this is a distinction. If Bulletin A-36 is part of the contract of employment between Appellants and Appellee, there is no significance in the manner in which it is negotiated or in the means by which it comes into existence.

It is respectfully submitted that Appellants' position is governed by the decision of this Court in the *Joshua Hendy* case to the effect that where there is a contract to pay overtime for work performed, the employer must pay such overtime if the activities of the employee fall within the meaning of the phrase "work performed."

The contention of Appellants that Bulletin A-36 constituted a promise to pay for all work performed in excess of 8 hours per day receives further support in *Frank v. Wilson & Co., Inc.*, 172 F. 2d 712 (C. C. A. 7, 1948). There the plaintiffs were employed in the Mechanical Division of the defendant who was in the meat packing business. The scheduled shifts for the plaintiffs were from 8:00 A. M. to 12 M. and from 12:30 P. M. to 4:30 P. M. During the period, however, the plaintiffs were required to report and be ready for work at 7:55 A. M. They received no compensation for the five minutes before their shift began. The employment contract in effect provided as follows (172 F. 2d 715):

> "Employees who are required to work over 8 hours in any one day * * * will be paid one and one-half times their regular rate for all such overtime hours."

The lower Court concluded that the five-minute period before the shifts of the plaintiffs began, constiuted activities which were compensable by an express provision of the written contract and gave judgment for the plaintiffs.

On appeal, the Court, citing the *Joshua Hendy* case, held the activities compensable by contract, stating (172 F. 2d.....714.....):

> "Defendant next cites the Portal-to-Portal Act of 1947 and legislative history pertaining thereto as an absolute bar to recovery under this action. It raised this defense by its amended answer as well as by timely motions at the trial. Sec. 2 of the Portal-to-Portal Act provides that no employer shall be subject to any liability under the Fair Labor Standards Act on account of failure to pay overtime compensation on account of any activity unless such activity was compensable by either (1) an express provision of a written or nonwritten contract, or (2) a custom or practice in effect at the time of such activity.
>
> The employment contract with the union which represented all the plaintiffs, which was in effect during the period here in question, provided:
>
> > 'Employees who *are required* to work over 8 hours in any one day * * * will be paid one and one-half times their regular rate for all such overtime hours.' (Italics added.)
>
> The trial court found that the plaintiffs were required to commence their usual activities five minutes before the time defendant computed the start of their working day for payroll purposes. The court also found that the plaintiffs were required by the rule of the company to be dressed for work and punched-in by 7:55 A. M. Much of the work that they did immediately after punching in, such as receiving instructions, drawing materials, going from the shop to the place of work, and carrying tools, was the same type of activity that they carried on from time to time throughout the day. It must be kept in mind that these plaintiffs were maintenance men, who might re-

main on one job all day, or who might go from place to place in the plant and participate in half a dozen jobs on any given day.

In *Joshua Hendy Corp. v. Mills,* 169 F. 2d 898, the Court of Appeals for the Ninth Circuit reviewed a somewhat similar situation. At that plant the normal daily work shift was eight and one-half hours, less a half-hour lunch period. It was Engineer Mills' duty to give almost constant attention to the boiler, which customarily prevented his taking time off for the lunch period. Nevertheless he was paid for only eight hours work per day. The labor contract in force provided that overtime compensation would be paid for all 'work performed' over forty hours per week. The court held:

> '* * * It is paragraph 4 of the contract which renders the Portal-to-Portal Act inoperative. That paragraph, it will be noted, establishes the work week at 40 hours straight time and 8 hours overtime and further provides for the payment of overtime for all "work performed" in excess of 40 hours per week. Mills performed 11 hours work in excess of 40 hours within the meaning of the phrase "work performed." He was paid for 8 hours overtime only.'

We are bound by the finding of the district court that the plaintiffs were required to work five minutes in excess of the eight regular hours on each of the days indicated by the time cards in evidence (as compiled in the stipulation). We conclude that the activities of the plaintiffs were covered by an express provision of a written contract, and that the Portal-to-Portal Act of 1947 is not a bar to maintaining this action."

The Court, however, reversed on the application of the *de minimis* doctrine.

It is undisputed that the work of Appellants consisted of the performance of various types of duties. It consisted, without distinction, in actively performing some duty and of the duty of remaining on the premises in order to perform any other duties integral to the general employment requirement. The work of Appellants was a bundle of activities, all of which taken together constituted the totality of what is designated "work." Appellee cannot avoid its liability by arbitrarily removing from the category of work certain activities for which it did not desire to make compensation. We respectfully submit that Appellee has failed to point out where and in what manner the *Joshua Hendy* case does not govern and accordingly we submit that under the rule of that case Appellants are entitled to recover. They performed work in excess of 40 hours per week, which by the very terms of their contract was compensable at overtime rates.

Appellee further founds its position on the assertion that a recovery by Appellants would be absurd. We have no desire to argue this point at this time, but we merely wish to point out that it has never been regarded, as far as we know, in the history of American labor relations, that "absurdity" is the proper descriptive term to apply to the recovery by employees for work performed for and for the benefit of employers.

IV. The Good Faith Defense.

Appellee states that they have established affirmatively the defense of good faith made available to employers under Sections 9 and 11 of the Portal-to-Portal Act.

It would be only repetitious at this time to discuss this phase of the case. There is fully set forth in Appellants' brief at pages 39 to 49, a discussion of the nature of those defenses and their inapplicability to the Appellee.

Of course, in view of the summary disposition given these cases by the Court below, there cannot be determined at this time the validity or invalidity of those defenses as put forth. However, we wish to direct the attention of this Court to pages 18, 19 and 20 of Appellants' brief where the rule is stated that defenses under Sections 9 and 11 of the Portal-to-Portal Act cannot be dismissed by summary disposition where the facts are put in issue by conflicting affidavits.

Conclusion.

It is respectfully submitted that Appellants' position as set forth in their opening brief has not been destroyed by the arguments of Appellee and, under the appropriate rules of law as therein set forth, the Judgments of Dismissal of the Court below should be reversed.

Respectfully submitted,

David Sokol and
Pacht, Warne, Ross & Bernhard, and
Isaac Pacht,
Bernard Reich,
Henry Attias,
Attorneys for Plaintiffs-Appellants.

APPENDIX.

One of the disputed issues of fact is the burden of the employment duties of Appellants. In Appellants' Affidavit in Support of Motion for Partial Summary Judgment, it is stated [R. 117]:

> "Because the plaintiffs were required on the premises of defendant for 24 hours each work day as a condition of employment, and were not free to go and come as they pleased after their regular 8 hours work, but were required to hold themselves in instant readiness to serve defendant, the normal living of the plaintiffs was interrupted. The requirement that plaintiffs listen for the telephone signals and alarms at night, affected their night time sleeping hours and their normal living.
>
> If a qualified relief man was not available to relieve plaintiffs on their days off, they would have to remain on the premises 24 hours each day until relief was obtained. Sometimes this resulted in the plaintiffs not having sufficient food available for a period of time and endangered the health of the plaintiffs and their families.
>
> In case of illness, since the plaintiffs could not leave the premises, they were dependent upon physicians of the defendant who came to the premises in emergency.
>
> Since some of the stations were located far from settled communities, the plaintiffs would have to do their shopping in larger communities on their days off, thus taking up a considerable part of their off duty time, on days when they were relieved.
>
> The purpose of the defendant's rule requiring the plaintiffs to remain on the premises 24 hours each

day, was for the sole benefit, convenience and necessity of the defendant. This is evident by the fact that if the plaintiffs were not available throughout the 24 hours, destruction of the defendant's property would follow. Thus for example: A routine check of an ammeter will prevent the overloading of a power line. By transferring part of the power load to another line, damage is prevented to the line itself and loss of power to the customer. A regular check on the transformer bank may show the temperature dangerously high. By checking, the operator may discover that the circulating pump is off. Failure to correct this may cause damage to defendant's equipment. Routine checks of the meters might show them behaving erratically, and by thus checking the switches the station attendant may discover that the switch contacts within the switch bank were arcing. Failure to discover this might mean that oil would become hot and explode and set fire to the switch, dropping the load on the bank and thus putting a lot of consumers out of service.

If the plaintiffs were not available to check the various instruments, transformers could be overheated and destroyed, causing loss in excess of $50,000, cost of some of the transformers. A loss of service resulting from the failure of any of the plaintiffs to perform their required duties would result in large property losses to the defendant.

The plaintiffs' presence on the defendant's property 24 hours each work day is of vital importance to all industries in the area because even the failure to turn on street lighting would disrupt commerce."

With respect to the disputed question of the contract of employment, said affidavit sets forth the following [R. 118]:

> "Prior to the Fair Labor Standards Act of 1938 the plaintiffs received only their salary for all of the aforesaid duties. By order issued by the defendant, after the F. L. S. A. went into effect, and throughout the period covered by this action, it was agreed that the plaintiffs would perform all of their aforesaid duties and would be paid a stipulated monthly salary, and that in addition, plaintiffs would receive time and a half their hourly rate based upon a forty hour week for all hours worked in excess of 40 in any work week. The plaintiffs did, after December 24, 1943, receive overtime pay at one and one-half times their hourly rate for work denominated by the defendants in their answer as 'extraordinary or emergency active duty.'"

In answer to certain of Appellee's Interrogatories, certain of the Appellants stated [R. 314]:

> "Answer to Interrogatory 80: *The plaintiffs understood that they were getting a salary for the work performed for the defendant, that the salary was based on forty hours of work each week and that they were to receive time and a half their regular hourly rate for all hours worked in excess of forty hours in each work week.* There was no reference at any time or at any place to active or inactive duties. There was never any distinction made by defendant between active or inactive duties. The defendant required the plaintiffs to perform their labors twenty-four hours a day.
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> Answer to Interrogatory 84: The activity in which the plaintiffs were engaged to wait to answer

emergencies was compensable by custom and practice. Defendant contends that the active duties of the plaintiff consumed not more than two or three hours a day; yet plaintiffs were paid for eight hours. Obviously, it was not for eight hours active duty for which plaintiffs were paid according to defendant, nor was it for any definite number of hours 'actual' work. Plaintiffs were being paid for all services regardless of the time of day when they were performed. This shows a custom and practice of paying for the activity in which plaintiffs were engaged during the time spent in waiting for calls and emergencies."

In the Affidavit of Plaintiffs-Substation Operators, it is stated [R. 303]:

"The undersigned plaintiffs being first duly sworn, depose and say: that *the only agreement entered into by the substation employees and the defendant, Southern California Edison Company, was that said employees would be hired on a salary basis, were required to remain on the premises twenty-four hours per day, and were to receive time and a half for all hours worked in excess of forty hours in each work week.*

In the hiring of substation help it was customary that prospective operators learned about the job and asked for employment on such job, usually going first to the division superintendent, who interviewed all operators first and then sent them to the main office. At the main office, nothing was said to substation operator that the work required only a few hours per day, or two or three hours per day. What was stated was that the physical activities required eight hours per day and that each employee was required to remain on the premises for the balance of the six-

teen hours each day. This is confirmed by the fact that the defendant company required substation employees to place on their time record only eight hours per day. Furthermore, the log entries show at least eight hours per day and frequently more.

In answer to the affidavit of J. D. Garrison, affiants state Mr. Garrison did not say that the active duties required two or three hours per day. On the contrary, Garrison informed substation employees that twenty-four hours each day was required of them.

With respect to the affidavit of Short, he did not at any time say that the substation employees could do as they pleased either after or during their regular work. No official of the defendant company at any time said that substation employees could do as they pleased. After eight hours the substation operators considered themselves free from routine duties but understood that they were still, for the balance of the 24-hour work day, in the employ of the defendant company.

When employed the substation employees were informed that the job required twenty-four hours each day. Nothing was said by any officer, agent, or representative of the defendant that the job was the equivalent of eight hours of duty or less. There were eight day hours each day when the employees were required to take readings and stay at the substation proper on company duty. Only after such eight hours could they go to their home on the premises. They were not free to do as they pleased during any part of said eight hours, or during the entire 24-hour period of each work day.

With respect to the failure of the plaintiffs to place on their time records the remaining sixteen hours each day as overtime, affiants state that the de-

fendant's officers and agents informed employees not to put down such time on the time record.

Affiants state that each work day they performed more than eight hours services for which they did not get paid. Plaintiffs were paid a monthly salary and were required to be on the premises twenty-four hours a day. They were instructed to put down only eight hours per day on their time cards. Overtime for special emergency work was paid after eight hours per day. During the entire twenty-four hour period of each work day, plaintiffs who were employed in the substations were subject to emergency calls and were required to wait for such emergency calls and to perform the other duties required of them by defendants."

In answer to Interrogatory No. 13 [R. 261]:

"Have the plaintiffs Paul W. Cockrell, J. D. Borden, A. L. Honnell and Clarence C. Prinslow, or any of them, ever been paid anything whatever for being required, during certain days of the week, in case they did not go home after the end of their shift, or after going home left their homes, to advise the switching center of a telephone number where they could be reached in case their services were needed in the event of an emergency;"

Appellants answered as follows [R. 320]:

"13. Yes. The employment agreement between the defendant and the Primary Servicemen provided that they would receive a monthly or weekly salary plus time and a half for all hours in excess of forty hours in each work week for all activities, including emergency and standby activity. See answer to 3."

The evidence given in depositions of the Appellants manifest the existence of disputes with respect to material facts. In the deposition of Vernon B. Wert, it is stated:

"Q. On what basis were you paid when you first began to work? A. I was given a monthly salary, my house and my electric energy.

Q. What were your instructions with reference to your hours of work? A. I can't remember that; however, the station that I first went to as a substation operator was a one-man substation, and we were not to leave the property. It was our duty to do whatever was required of us, and that the statement by Mr. Dyer remains in my memory as having been 'The hours of employment are what the job requires.'

Q. And you were required to stay there 24 hours a day, except on your days off. Is that correct? A. That is right.

Q. Has that been the continuous practice ever since that time? A. Yes. [Deposition, p. 4, lines 7 to 24.]

Q. Is it a fact that you have received certain overtime after 40 hours in the work week? A. We have.

Q. Up to the time that the Manpower Commission changed the work week to 48 hours. Is that correct? A. That is right.

Q. Despite that change, your regular work week has been 40 hours a week? A. It's 40 hours a week.

Q. It is 40 hours a week? A. Yes.

Q. The only difference is that you get an extra eight hours of overtime? A. That is right.

Q. Now, you stated that you did get some overtime, for instance, in answering those telephone calls that you mentioned? A. That is right.

Q. How was that overtime based? On what method of computation? A. It was one and one-half times the average annual rate.

Q. Wasn't it the average hourly rate? A. The average annual hourly rate. I beg your pardon.

Q. In receiving your pay, then, you considered that you were receiving pay for eight hours a day? A. That is right.

Q. Nevertheless, after you worked your eight hours a day, you did remain on duty. Is that correct? A. I remained on call, on the job.

Q. On the job? A. Yes." [Deposition, p. 37, line 22, through p. 39, line 1.]

In the deposition of Eugene L. Ellingford, it is stated:

"Q. Which one of those men told you about the work of being a substation operator? A. Mr. Garrison, Mr. L. L. Dyer, Mr. W. L. Dyer and Mr. H. L. Steck.

Q. They all told you the same story? A. That is correct.

Q. What did they tell you about the job, the nature of the job? A. They told me that I would be subject to anything that might be required; that I would be required to put in 24 hours a day; and that not to become discouraged because it was their policy to move the men up as they got the opportunity." [Deposition, p. 3, line 23, through p. 4, line 9.]

In the deposition of M. E. Roach, it is stated:

"Q. What were your hours supposed to be? A. 7:30 to 4:30 with an hour for lunch.

Q. What do you base your claims for overtime on? A. I don't understand the question.

Q. Well, you are suing for a claim of overtime which you haven't been paid for. On what do you base that claim? A. I call it standby time.

Q. Well, tell me on what you base that? A. I was there on the property. I had to live on the property. I couldn't go and come as I pleased.

Q. Did you have any work keeping up the yard? A. Very little. There was a utility man there that done most of it.

Q. So, as I understand it, your regular hours of work were 7:30 in the morning to 4:30 in the afternoon, with an hour off at lunch? A. That is right.

Q. You have given us your estimate, which I won't repeat; and instructions were when you finished up you were to go into this machine shop and assist the man there? A. That is right.

Q. Now, why didn't you leave the property at the end of your day at 4:30? A. I was told when I went there it was a 24-hour job, and I was to stay there.

Q. Who told you that? A. I was told by A. J. Robertson, deceased.

Q. What position did he have? A. He was superintendent of hydro generation in the San Joaquin Division." [Deposition, p. 8, line 14, through p. 9, line 17.]

In the deposition of H. L. Anderson, it is stated:

"Q. When you were hired by Mr. Short as an apprentice, what did he tell you about the job? A. He told me that the job would necessitate my staying on the property 24 hours a day; in relieving men in one-man substations it would be necessary to drive to a substation and arrive there at 8:00 o'clock in the morning, and remain there until 8:00 o'clock on the

morning that my relief was finished; that the job would ultimately lead into one-man substation operator, or station attendant, as they were called; that I would live on the property, then, and have a cottage on the property, and be required to stay on the premises 24 hours a day until my scheduled day off, when the relief man would come in and relieve me and take over for that 24-hour period.

Q. Did he tell you anything about the duties on the job as a substation attendant? A. Yes. He told me that the duties entailed keeping up the grounds and equipment, trip testing, routine switching operation, and emergency switching operations.

Q. Did he tell you anything else about the job that you can recall? A. That is about all.

Q. Was there anything said about salary? A. Yes.

Q. For substation attendant? A. Yes.

Q. What was said about that? A. *He said that the starting salary would be $120.00 per month.*

Q. *What was that to cover?* A. *Well, that was my wages for the job.*

Q. *The whole job?* A. *Uh huh."* [Deposition, p. 3, line 18, through p. 4, line 24.]